No. 85-1864

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL BOOK CORPORATION,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Maryland Court of Special Appeals properly refused to suppress magazines seized pursuant to warrant which were alleged to have violated the Maryland prohibition on the display of sexually explicit visual representations for advertising purposes, Article 27, §416D, Maryland Annotated Code?

2. Whether the State of Maryland may constitutionally regulate the display of obscene material for advertising purposes without regard to whether the material is exposed to juveniles?

TABLE OF CONTENTS

Page

Questions Presented for Review . . . . . .

Statement of the Case 1

Statement of Facts 2

Relevant Statutory Provision 2

Reasons for denying the issuance of a writ of certiorari 3

I. The unique factual circumstances of this case, coupled with the total good faith of the police officers in the application for, and execution of, the search warrant obviates the need for further review of the constitutionality of the search and seizure. 3

II. The Maryland statute is constitutional and does not require review by this court 12

Conclusion 14

TABLE OF CITATIONS

Cases

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 13

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) 8, 9, 11

Page

Massachusetts v. Sheppard,
__ U.S. __, 104 S.Ct. 3424,
82 L.Ed.2d 737 (1984) 6

New York v. Ferber,
458 U.S. 747 (1982) 13, 14

New York v. P.J. Video,
475 U.S. __, 106 S.Ct. 1610,
89 L.Ed.2d 871 (1986) 10, 11

Roth v. United States,
354 U.S. 476 (1957) 14

Smiley v. State, 294 Md. 461,
450 A.2d 909 (1982) 5, 13

State v. Randall Book Corporation,
53 Md. App. 30, 451 A.2d 187
(1982), cert. denied, __ U.S.
__, 104 S.Ct. 286, 78 L.Ed.2d
263 (1983) 6

United States v. Guarino,
610 F.Supp. 371
(D. R.I. 1984) 7, 8, 9

United States v. Leon, __ U.S. __,
104 S.Ct. 3405,
82 L.Ed.2d 677 (1984) 6

Constitutional Provisions

United States Constitution:

First Amendment . . . . . 10, passim

Fourth Amendment 10

Page

Statutes

Annotated Code of Maryland:

Article 27, §416A 2, 5

Article 27, §416D 4, 5

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF FACTS

Respondent accepts Petitioner's Statement of Facts as sufficient to frame the issues. However, Respondent reserves the right to supplement, clarify or modify as necessary in the argument that follows.

RELEVANT STATUTORY PROVISION

Annotated Code of Maryland, Article 27, §416A:

> "The following words and phrases, as used in this subheading, have the meanings indicated:
>
> (a) Advertising purposes means the purpose of propagandizing in connection with the sale commercially of a product or products, or the offering commercially of a service, or the exhibiting commercially of entertainment.
>
> (b) Minor means any person under eighteen years of age.
>
> (c) Sadomasochistic abuse means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, or otherwise physically restrained.

(d) Sexual conduct means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

(e) Sexual excitement means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity."

REASONS FOR DENYING THE ISSUANCE OF A WRIT OF CERTIORARI

I.

THE UNIQUE FACTUAL CIRCUMSTANCES OF THIS CASE, COUPLED WITH THE TOTAL GOOD FAITH OF THE POLICE OFFICERS IN THE APPLICATION FOR, AND EXECUTION OF, THE SEARCH WARRANT OBVIATES THE NEED FOR FURTHER REVIEW OF THE CONSTITUTIONALITY OF THE SEARCH AND SEIZURE.

Facts similar to those in the instant case may never again appear. Charges were originally brought

against the Randall Book Corporation under Maryland Annotated Code, Article 27, §416D based upon the display of sexually explicit materials for advertising purposes. Nothing in the language of §416D appeared to require a finding of obscenity in order for a violation to be found. As a result, the probable cause determination did not include a finding that the materials were obscene. On the other hand, the application did include an articulation under oath of the results of long-term surveillance of the book store, information concerning the arrest and prosecution of individuals working in the book store, description of the materials contained in the book store, and attached to the lengthy affidavit were photocopied samples of materials displayed. In accordance with the warrant, the police then seized all materials displayed for advertising purposes that depicted the

highly specific conduct that was prohibited under the terms of the statute.[1]

Upon the commencement of the prosecution in this case, the trial judge dismissed the charges, ruling that the statute was unconstitutional as vague and overbroad. Subsequent to that determination by the trial court, the Maryland Court of Appeals addressed the issue of constitutionality in Smiley v. State, 294 Md. 461, 450 A.2d 909 (1982). In Smiley, the Court of Appeals engrafted onto the statute a requirement that the materials restricted from display be obscene in order to overcome the constitutional objections raised. The State, meanwhile, had appealed the unconstitutionality determination made in this case and, because of the intervening Smiley decision,

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[1] Nudity alone is not sufficient to constitute a violation of §416D under the terms of the statute. Rather, the language of the statute prescribes that a violation occurs only when the visual representation "depicts sadomasochistic abuse, sexual conduct or sexual excitement." In turn, these terms are defined in §416A. This statute has been reproduced, supra.

prevailed on appeal. State v. Randall Book Corporation, 53 Md. App. 30, 451 A.2d 187 (1982), cert. denied, __ U.S. __, 104 S.Ct. 286, 78 L.Ed.2d 263 (1983).

As noted above, however, because no obscenity requirement explicitly appeared in the langauge of the statute, there had never been a finding of obscenity made in conjunction with the issuance of the search and seizure warrant.[2] Thus, in reviewing the book store's contention on appeal regarding suppression, the Maryland Court of Special Appeals did not rule on the legality of the seizure. Instead, the court relied upon this Court's decisions in United States v. Leon, __ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and Massachusetts v. Sheppard, __ U.S. __, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), and found that the absolute good faith of the police negated the need to apply the exclusionary rule. As the conclusion of the court that

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[2] Of course, Petitioner's convictions were premised upon findings of obscenity beyond a reasonable doubt.

the officers acted in good faith in obtaining the warrant and executing the warrant in accordance with its terms is beyond reproach, and inasmuch as Leon and Sheppard unmistakably deny the extension of the exclusionary rule to situations where the fault in an erroneous search and seizure pursuant to warrant lies with the magistrate and is not evident upon the face of the warrant, the Maryland Court of Special Appeals was clearly correct in its determination that the good faith exception to the exclusionary rule negated the necessity for suppression.

Relying upon United States v. Guarino, 610 F.Supp. 371 (D. R.I. 1984), the book store contends that Leon and Sheppard cannot be applied in this type of First Amendment context. Guarino, however, erroneously construes Leon and is clearly distinguishable from the case here. In Guarino, the court relied upon that portion of Leon, 104 S.Ct. at 3422, 82 L.Ed.2d at 699, where this Court stated, "the exception we recognize today will also not apply in

cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979); in such circumstances, no reasonably well-trained officer should rely on the warrant." Seizing on this language, the Guarino court looked to the decision in Lo-Ji Sales and concluded that Leon should not apply either where the magistrate abandons his neutral role and acts as an arm of the prosecution, or where there has been an improper delegation of an obscenity determination. However, a review of this Court's earlier reference to Lo-Ji within the Leon opinion reflects concern only for those instances where the magistrate abandons his judicial role of neutrality. United States v. Leon, 104 S.Ct. at 3417; 82 L.Ed.2d at 693. Here, the magistrate never abandoned his judicial role and the book store has never asserted such a claim. Instead, the sole allegation made by the store is that the magistrate improperly delegated his authority to the police

officers. As this aspect of the Lo-Ji decision was not encompassed in this Court's dissertation of situations in which the good faith exception would not apply, the Guarino decision constitutes an overbroad reading of Leon, and there is no basis to find the good faith exception inapplicable to this situation.

Moreover, even if both aspects of Lo-Ji would preclude the applicability of Leon, that would be so only because in either case an executing officer could not maintain a reasonable belief in the validity of the warrant. Here, however, maintaining such a reasonable belief was not precluded because the concept of obscenity was not thought to apply to the prohibition in question. Instead, the officers were guided in specific terms to seize only those visual representations that fell within the specific terms of the statute. Assuming that it was reasonable for law enforcement officers to rely upon the plain literal meaning of the words of a statute without reading into those words any additional restrictions, it was

reasonable to rely on the warrant issued pursuant to the lengthy rendition of facts and circumstances contained in the application and the samples submitted therewith. There is simply no basis to find that the good faith exception should not apply.

Finally, the book store asserts that the size of the seizure somehow precludes the application of Leon and Sheppard. This Court has recently addressed the interaction of the Fourth Amendment and First Amendment. New York v. P.J. Video, 475 U.S. __, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986). In that case, this Court noted that although the First Amendment implications served to limit warrantless seizures, the First Amendment had no impact on the level of probable cause necessary to support the issuing of a warrant. Similarly, where a warrant is obtained, the First Amendment implications should not preclude application of the good faith exception to the exclusionary rule. As noted above, in United States v. Leon this Court related the inapplicability of the good faith

exception to circumstances existing in a First Amendment case, Lo-Ji Sales. However, this Court did not blanketly hold that the good faith exception did not apply to First Amendment cases. Rather, the restriction on the applicability of the doctrine was held to extend only to the First Amendment context where the judicial officer abandoned his role of neutrality. Although the seizure here was large, it was in accordance with the authority vested in the officers under the terms of the warrant. As a result, there was no bar to the application of the good faith exception.[3]

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[3] The book store additionally contends that the writ should be granted because of the failure of the lower court to apply the standard of probable cause set forth by this Court in New York v. P.J. Video, supra. However, there has never been a dispute over the fact that no finding of obscenity was made in conjunction with the search and seizure. The issue is whether a search and seizure conducted pursuant to a warrant issued without an obscenity determination under the circumstances here can be excused under the good faith exception.

II.

THE MARYLAND STATUTE IS CONSTITUTIONAL AND DOES NOT REQUIRE REVIEW BY THIS COURT.

The Maryland statute restricts the display for advertising purposes of visual representations of certain delineated sexual conduct. Because the statute, literally construed, may have prohibited the display of some non-obscene visual representations (for example, a crucifix), the Court of Appeals, reacting to a charge of overbreadth, imposed on the statute the additional element that the prohibited material be obscene. Despite this element, the book store contends that the Maryland statute remains overbroad because the statute bans all display for advertising purposes, and not only displays subject to viewing by juveniles. However, given the State's right to regulate obscenity, the absence of a limitation to situations where the protection of juveniles is involved does not offend the First Amendment.

In New York v. Ferber, 458 U.S. 747, 773-74 (1982), this Court refused to strike a "display" law on the grounds of overbreadth, holding that "whatever overbreadth may exist should be cured through case by case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Id., quoting Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973). In Smiley v. State, supra, the Maryland Court of Appeals relied upon this Court's Ferber decision in upholding the constitutionality of this statute against an attack based upon overbreadth. The book store contends that the Maryland Court of Appeals' reliance upon Ferber was misplaced in that Ferber was restricted to situations involving juveniles. What the book store overlooks, however, is that the restriction to juveniles in Ferber (specifically to child pornography) was implemented as an alternative to a restriction on obscene materials. The issue before this Court in Ferber was whether a statute could "prohibit the dissemination of material which shows children

engaged in sexual conduct, regardless of whether such material is obscene?" This Court held that restrictions on non-obscene child pornography could be imposed without offending the First Amendment because of the special obligation of society to protect its children. However, Ferber does not stand for the proposition that the display of obscene material can be restricted only for the protection of children. In Roth v. United States, 354 U.S. 476, 485 (1957), this Court held that "obscenity is not within the area of constitutionally protected speech or press." Under this holding, there is no unconstitutionality in the restriction on the use of obscene material for advertising purposes.

CONCLUSION

This case involves the unique situation where a statute, seemingly clear on its face, was applied to the letter by the police officers applying for a warrant, the judicial magistrate issuing the warrant, and the police officers executing the warrant. The good faith of the parties involved is beyond dispute. However, a

subsequent interpretation of the statute involved engrafted the additional element of obscenity upon the statute. A consideration of the purposes for the exclusionary rule, together with the recently recognized good faith exception in cases where a warrant has been obtained, reflects no basis for the application of the exclusionary rule in this case.

Further, once the element of obscenity was engrafted onto the statute, the constitutionality of restricting the use of obscene materials for advertising purposes is beyond reproach.

For these reasons, the State of Maryland respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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